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In the Supreme Court of the United States

OCTOBER TERM, 1957

MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS, SUCCESSOR BY CONSOLIDATION TO THE INDIANA TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF GUY E. STREET, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA AND GARY CAMPBELL, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The special findings of fact and separate conclusions of law of the District Court (Pet. 40–71; R. 64–95)[1]

[1] References designated "R." are to the appendix to the brief filed in the United States Court of Appeals for the Seventh Circuit on behalf of the Defendants-Appellants, the United States of America and District Director of Internal Revenue. References designated "Supp. R." are to the appendix to the brief filed in that court on behalf of the taxpayer, Merchants National Bank & Trust Company of Indianapolis.

are not officially reported. The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. 25–39) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 20, 1957. (Pet. 39.) A petition for rehearing was denied August 6, 1957. (Pet. 39.) The petition for a writ of certiorari was filed September 18, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

In computing the marital deduction allowed for federal estate tax purposes by Section 812 (e) of the Internal Revenue Code of 1939, is the value of the widow's interest in the estate of an Indiana decedent, which she elected to take against the will, to be reduced by the portion of the federal estate and state inheritance taxes attributable to her interest?

STATUTES AND REGULATIONS

The relevant portions of Section 812 (e) (1) (A), (e) (1) (E) (i), (e) (3) (A), (e) (3) (B), and (e) (4) (A) of the Internal Revenue Code of 1939, Section 81.47c of Treasury Regulations 105, Sections 6–1301, 6–2313, and 6–2319 of Burns Indiana Statutes Annotated (1933 ed.), and Section 6–301 of Burns Indiana Statutes Annotated (1953 ed.), are set out in the Appendix, *infra*, pp. 12–15.

STATEMENT

The facts as stipulated by the parties (R. 37–54), as set forth in the findings of fact of the District

Court (Pet. 40–67), and as otherwise shown in the record, may be summarized as follows:

Guy E. Street died August 16, 1950, his will being duly probated in the Probate Court of Marion County, Indiana. The taxpayer herein is the duly appointed executor and trustee under the will. The text of the will appears in full in the special findings of fact. (Pet. 41–51; R. 65–76.) By his will, deceased left certain personal property to his wife, other personal property to his daughter, and made specific bequests to four relatives. The rest of his estate by Item V of the will was placed in trust, 2% of the principal to be distributed during a ten-year period to his wife, daughter, and other beneficiaries in named percentages; the income of the trust to be distributed to various beneficiaries, including 4/10 to his wife for life, at her death to their daughter, and at her death to grandchildren; the trust to continue for the lives of the various beneficiaries, and the principal of the trust to be then distributed as provided in the will. (Pet. 26; R. 38, 65–76.)

The will provided in part (Pet. 41, 48; R. 65, 72):

Item I

> I direct that all federal estate and state inheritance and estate taxes that may be assessed upon my estate or payable by any beneficiary thereof on account of the provisions hereof made in their behalf be paid from and out of my residuary estate.

Item V

* * * * *

10. My Trustee is specifically authorized and empowered: * * * to apply the principal of the trust estate to the payment of any and all inheritance, estate, succession or other taxes, State or Federal, levied or assessed against my estate or any beneficiary thereof by reason of the transfers herein; * * *.

On February 14, 1951, the widow renounced the provisions made for her in the will and elected to take under the laws of descent of Indiana, reserving, however, her interest in life insurance policies of which she was beneficiary, and her rights as surviving tenant by the entireties in certain real estate. (Pet. 52–53; R. 39, 76–78.)

Her renunciation stated in part (Pet. 53; R. 77):

> It is not intended hereby and I do not release the Executor under the last will and testament of the said decedent and his estate from existing obligations to make payment of all federal estate taxes imposed upon any and all property hereinabove referred to, and all state inheritance and estate taxes.

On May 7, 1951, the taxpayer filed a complaint in the Marion County Probate Court for a construction of the will and for instructions, joining the widow, heirs, legatees, and beneficiaries of the trust as defendants. The complete record of this proceeding is attached to the stipulation of facts (R. 37–54) in the original transcript of record as Exhibit D, and excerpts appear in the record. (R. 44–51; Supp. R. 1–15.) The only answer in opposition to the com-

plaint was filed on behalf of William McClenon as guardian *ad litem* of the minor and unborn children of himself and decedent's daughter, Ruth Gladys McClenon. In this answer, McClenon's attorney, Howard P. Travis, alleged that the widow by her election had lost all her rights to any property under the will, and that she should be required to pay her additional share of federal estate tax in proportion to the property received by her. The Probate Court held an oral hearing October 23, 1951, and ordered briefs filed. After briefs were filed on behalf of the executor and the widow, but before Mr. Travis had an opportunity to file a brief in answer to these briefs, the Probate Court on February 21, 1952, entered its order adjudicating the issues in favor of the widow. The Government was not a party to this proceeding. (Pet. 54–56; R. 44–49, 56–58, 78–87.)

The Probate Court ordered in part (R. 81, 84):

> ORDERED, ADJUDGED, AND DECREED that The Indiana Trust Company, as Executor, is hereby ordered to pay all federal estate taxes and all inheritance taxes assessed by the United States, the State of Indiana or any other state, by virtue of the death of Guy E. Street or any transfer made by Guy E. Street, deceased, and The Indiana Trust Company as Executor or as Trustee is hereby ordered not to seek or receive reimbursement for any portion of said inheritance or federal estate taxes, from any person whomsoever, whether he be beneficiary of a life insurance policy, surviving joint tenant, or tenant by the entirety, heir, donee, surviving widow, assignee, legatee, devisee, cestui que trust, or other person;

Mr. Travis on behalf of his clients filed a Motion for New Trial on March 11, 1952, alleging that the decision of the Probate Court was contrary to law, and that the proceedings were irregular in that decedent's daughter, a necessary party, was not represented at the trial and no judgment of default was entered against her, so that the decree was void as to all defendants. On March 18, 1952, Mr. Travis withdrew the motion for new trial, and also his appearance as counsel, at the express direction of the defendants he represented. The Probate Court subsequently entered a second judgment identical with the first except for an additional finding and judgment of default against decedent's daughter. Mr. Travis testified as a witness for the Government at the trial of the instant proceeding, and his testimony was to the effect that his clients informed him that they were in accord with the order of the Probate Court, that they were in agreement with the contentions advanced by the executor and widow, and that it was not desired that he proceed further with his motion for new trial. (R. 49–51, 59, 63–64, 81–95.)

In the estate tax return filed by the executor on November 16, 1951, a deduction under Schedule M for bequests, etc., to surviving spouse (marital deduction) was claimed in the amount of $344,846.58, as representing the value of property passing to the widow. After an audit of the return, the Commissioner determined that the amount of the marital deduction should be $280,933.55, computed by deducting from the amount claimed the amount of federal estate tax ($53,770.01) and state inheritance tax

($10,222.03) applicable to the widow's interest in the estate. The net assessed deficiency, resulting from this and other adjustments not here in issue, of $19,266.51 plus interest of $3,064.67, or a total of $22,331.18, was paid to the District Director. The executor's claim for refund was rejected by the Commissioner, and this suit for refund followed. The District Court decided the case in favor of the taxpayer. (R. 39–43, 51–53, 95–96; Pet. 71–72.) The Court of Appeals sustained the Commissioner's determination. It held that, in computing the marital deduction allowable under 1939 Code Section 812 (e) (1) (E) (i), Indiana law requires that the value of the interest passing to the widow be reduced by the *pro rata* share of the federal estate tax attributable to her interest; and it found under the facts that the decree of the Probate Court of Marion County was non-adversary, contrary to Indiana law, and not binding on the United States. (Pet. 25–39.)

ARGUMENT

There is no basis for further review. The decision below turns upon the application of state law to the particular facts of this case, is correct, and is not in conflict with any appellate court decision.

1. For purposes of computing the net estate subject to the federal estate tax, Section 812 (e) of the Internal Revenue Code of 1939, Appendix, *infra*, pp. 12–13, authorizes a deduction from the gross estate of a so-called marital deduction, *i. e.*, "the value of any interest in property which passes or has passed from the decedent to his surviving spouse". This section

further provides that the interest passing to the surviving spouse must be valued after taking into account "the effect" upon it of the federal estate tax. What property interests pass from the decedent to his heirs or legatees, and the impact upon such interest of the federal estate tax, are matters of state law. *Riggs* v. *Del Drago*, 317 U. S. 95; *Harrison* v. *Northern Trust Co.*, 317 U. S. 476; *Y. M. C. A.* v. *Davis*, 264 U. S. 47.

In this case, an Indiana decedent left a will directing that all federal estate and state inheritance taxes be paid out of his residuary estate, which was bequeathed in trust for the benefit of various members of his family including his wife. The widow renounced the will and elected to take the share to which she was entitled under the Indiana laws of descent, namely, a one-third interest in the decedent's property after payment of debts. After analyzing the applicable Indiana law, the court below concluded that the widow's elective share was subject to a proportionate share of the estate taxes, and that consequently the value of her interest for purposes of computing the marital deduction must be correspondingly reduced. (Pet. 28–33.) Its decision is clearly in accord with the Indiana statutory scheme of distribution, and with Indiana decisions holding that where a wife renounces the will she receives her interest after payment of debts, including taxes. See Burns Indiana Statutes Annotated (1933 ed.), Sections 6–1301, 6–2313, 6–2319, 6–2334; *Cornet* v. *Guedelhoefer*, 219 Ind. 200; *Quirk* v. *Kirk*, 64 Ind. App. 496; *Pearcy* v. *Citizens Bank & Trust Co. of Bloomington*, 121 Ind. App. 136, rehear-

ing denied, 121 Ind. App. 136, *Cassidy* v. *Padgett*, 99 Ind. App. 239.

The county probate court decree upon which taxpayer relies (Pet. 19–20) is contrary to the Indiana statute and higher court decisions. Moreover, that decree was obtained in a non-adversary proceeding—a conclusion demanded by the facts recited in the opinion below (Pet 33–38)—and hence was not binding upon the United States in this federal tax litigation. See *Commissioner* v. *Tower*, 327 U. S. 280; *Newman* v. *Commissioner*, 222 F. 2d 131 (C. A. 9th); *Falk* v. *Commissioner*, 189 F. 2d 806 (C. A. 3d), certiorari denied, 342 U. S. 861; *Doll* v. *Commissioner*, 149 F. 2d 239 (C. A. 8th), certiorari denied, 326 U. S. 725; *Pitts* v. *Hamrick*, 228 F. 2d 486 (C. A. 4th).

2. Taxpayer points to no authority which is in conflict with the decision below. The cases upon which it relies did not involve the application of Indiana law to a situation where, as here, the widow renounces the will. Indeed, seven of the eight state court decisions with which it alleges conflict (Pet. 18, fn. 2) arose in jurisdictions which, unlike Indiana, have statutes governing apportionment of estate taxes,[2] and the law of the other (Kentucky) is different from that of Indiana. See *Pearcy* v. *Citizens Bank & Trust Co. of Bloomington*, *supra*, pp. 156–157. As for the

[2] The states differ as to the effect of the estate tax in the absence of a specific provision in the will. Some have apportionment statutes expressly dealing with the problem. Of those which do not have such statutes, the courts of some have held that the share inherited by the widow is free of the tax, while those of others (*e. g.*, Indiana) have held that her share must bear a proportionate share of the tax.

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Indiana cases upon which taxpayer relies (Pet. 16), none of them dealt with whether a widow's elective share of her husband's estate is subject to a *pro rata* share of the estate tax. Taxpayer's attempt (Pet. 16–17) to assimilate this case to one where the will directs payment of the widow's share free of the tax burden is unfounded; under Indiana law the widow cannot renounce the will and yet retain its benefits. *Rowley* v. *Sanns*, 141 Ind. 179; *Clark* v. *Clark*, 132 Ind. 25. By renouncing the will and electing to take under the Indiana laws of descent, the widow received one-third of the decedent's estate after payment of debts (Burns Indiana Statutes Annotated (1933 ed.), Sections 6–2313 and 6–2319, Appendix, *infra*, pp. 14–15; *Quirk* v. *Kirk*, *supra*); and the Indiana law prescribes payment of taxes ahead of payment to legatees or heirs (Burns Indiana Statutes Annotated (1933 ed.), Section 6–1301, Appendix, *infra*, p. 14; *Cornet* v. *Guedelhoefer*, *supra*).

Nor is there any conflict, as taxpayer asserts (Pet. 16, 19–20), with cases dealing with the effect of state court decisions in federal tax cases. The record clearly shows, as the court below concluded, that the county probate court decree which taxpayer insists should have been accorded binding effect for federal estate tax purposes was procured in a non-adversary proceeding. Such a decree is not determinative of federal tax consequences. See *Newman* v. *Commissioner*, 222 F. 2d 131 (C. A. 9th); *Doll* v. *Commissioner*, 149 F. 2d 239 (C. A. 8th), certiorari denied, 326 U. S. 725. The cases cited by taxpayer did not, as

does this one, involve a non-adversary or collusive proceeding.[3]

3. The issue presented is not one of general importance. Since it turns entirely on Indiana law and its own facts, the decision below can affect only a limited class of decedents. It will not be controlling as to decedents in other states. Even as respects Indiana decedents, it will not affect one who leaves a will which makes specific provision regarding apportionment of the estate tax; it applies only where the decedent dies intestate, or leaves a will which the surviving spouse renounces.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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OCTOBER 1957.

[3] In any event, as the court below observed (Pet. 36), there is no need in this case to resolve any alleged conflict on this point, since both parties agreed below that the probate court decree is not binding in this federal tax litigation if it was entered in a non-adversary proceeding.

APPENDIX

Internal Revenue Code of 1939:

SEC. 812. NET ESTATE

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(e) [as added by Sec. 361, Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of marital deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

* * * * *

(E) *Valuation of Interest Passing to Surviving Spouse.*—In determining for the purposes of subparagraph (A) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this subsection—

(i) there shall be taken into account the effect which a tax imposed by this chapter, or any estate, succession, legacy, or inheritance tax, has upon the net value to the surviving spouse of such interest; and

* * * * *

(3) *Definition.*—For the purposes of this subsection an interest in property shall be considered as passing from the decedent to any person if and only if—

(A) such interest is bequeathed or devised to such person by the decedent; or

(B) such interest is inherited by such person from the decedent; or

* * * * *

(4) *Disclaimers.*—

(A) *By Surviving Spouse.*—If under this subsection an interest would, in the absence of a disclaimer by the surviving spouse, be considered as passing from the decedent to such spouse, and if a disclaimer of such interest is made by such spouse, then such interest shall, for the purposes of this subsection, be considered as passing to the person or persons entitled to receive such interest as a result of the disclaimer.

* * * * *

(26 U. S. C. 1952 ed., Sec. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939:

SEC. 81.47c [as added by T. D. 5699, 1949–1 Cum. Bull. 181, 206]. *Valuation of Property Interest Passing to Surviving Spouse.*—

* * * * *

(c) *Effect of death taxes.*—Section 812 (e) (1) (E) provides that in the determination of the value of any property interest which passed from the decedent to his surviving spouse, there shall be taken into account the effect which the Federal estate tax, or any estate, succession, legacy, or inheritance tax, has upon the net value to the surviving spouse of such property interest.

* * * * *

If the decedent bequeaths his residuary estate, or a portion thereof, to his surviving spouse, and his will contains a direction that all death taxes shall be payable out of such residuary estate, the value of the bequest, for

the purpose of the marital deduction, is based upon the amount of the residue as reduced pursuant to such direction. If the residuary estate, or a portion thereof, is bequeathed to the surviving spouse, and by the local law the Federal estate tax is payable out of the residuary estate, the value of the bequest, for the purpose of the marital deduction, may not exceed the amount thereof as reduced by the Federal estate tax.

* * * * *

Burns Indiana Statutes Annotated (1933 ed.):

SEC. 6-1301 [3229]. *Order of paying debts.*—Unless otherwise provided in this act, the debts and liabilities of a decedent, shall, if his estate be solvent, be paid in the following order of classes:

First. The expense of administration.

Second. The expenses of the funeral of the deceased.

Third. The expenses of his last sickness.

Fourth. Taxes accrued upon the real and personal estate of the deceased at his death, and taxes assessed upon the personal estate during the course of the administration.

Fifth. Debts secured by liens upon the personal and real estate of the decedent, * * *

Sixth. A sum not exceeding fifty dollars [$50.00] for wages due any employee for work and labor performed for the decedent within two [2] months prior to his death.

Seventh. General debts.

Eighth. Legacies. [Acts 1881 (Spec. Sess.), ch. 45, § 152, p. 423.]

SEC. 6-2313 [3337]. *Widow.*—If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors: Provided, however, That where the real estate exceeds in value ten thousand dollars [$10,000], the widow shall have one-fourth only, and where

the real estate exceeds twenty thousand dollars [$20,000], one-fifth only, as against creditors. [I. R. S. 1852, ch. 27, § 17, p. 248.]

SEC. 6–2319 [3343]. *Widow's interest in personal estate.*—If a man die testate leaving a widow, one third of his personal estate shall descend to said widow, subject, however, to its proportion of the debts of said decedent: Provided, however, That nothing in this act shall be construed to reduce the interest which the law now gives a widow in the estate of a deceased husband: And provided, further, That such widow may elect to take under the will of said decedent instead of this or any other law of descent of this state, which election shall be made within ninety [90] days after said will has been admitted to probate in this state, and in the same manner as widows are now required by law to elect. [Acts 1891, ch. 185, § 1, p. 404.]

Burns, Indiana Statutes Annotated (1953 ed.):

SEC. 6–301 * * *

(d) * * * Where by virtue of an election pursuant to this article [§§ 6–301—6–308] it is determined that such spouse has renounced his rights in any devise, either in trust or otherwise, the will shall be construed with respect to the property so devised to him as if such surviving spouse had predeceased the testator.

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